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In the

Supreme Court of the United States.

OCTOBER TERM, 1943.

No. 152

MARY C. ROBERTS, ADMINISTRATRIX, ET AL.,
Plaintiffs, Appellants, Petitioners,

v.

UNITED FISHERIES VESSELS COMPANY,
Defendant, Appellee, Respondent.

PETITION FOR WRIT OF CERTIORARI
AND
BRIEF IN SUPPORT OF PETITION.

H. S. AVERY,
Attorney for Petitioners.

A. L. KAPLAN,
of Counsel.

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L. H. LANE COMPANY, LAW PRINTERS, 221 HIGH ST., BOSTON, MASS.

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BRIEF IN SUPPORT OF PETITION.

ARGUMENT 9

I. The Course of Reasoning and Decision Rendered by the Circuit Court of Appeals in the Case at Bar, as it Relates to the Standard of Care in Seamen's Actions under The Jones Act, was in Conflict with Decisions of this Honorable Court and with Decisions of the Circuit Courts for the Second, Third and Fourth Circuits and was such a Departure from the Accepted and Usual Course of Judicial Proceedings in such Actions, as to Call for the Exercise of this Court's Power of Supervision 9

(a) The decision of the Circuit Court of Appeals for the First Circuit, in approving the trial court's charge of merely general definitions of law and its refusal and failure to instruct the jury on the high degree of care owed to seamen in actions under the Jones Act, was clear error and prejudicial to the petitioner . . . 9

(b) The decisions of this Honorable Court and of the Circuit Court of Appeals for the Second,

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Third and Fourth Circuits, substantiate the proposition advanced by the petitioners that a higher degree of care is to be exercised by the master for the protection of his crew, than is required of shore employers and under the common law 11

(c) The authorities cited by the Circuit Court of Appeals, in the case at bar, fail to support and justify the conclusions set forth therein . . 16

II. The Course of Reasoning and Decision Rendered by the Circuit Court of Appeals for the First Circuit, as it Relates to Assumption of Risk in Seamen's Actions Under the Jones Act, was in Conflict with Numerous Decisions of this Honorable Court and with Decisions of the Circuit Court of Appeals for the Second, Third, and Sixth Circuits and was Such a Departure from the Accepted and Usual Course of Judicial Proceedings in Actions Under the Jones Act, as to Call for the Exercise of this Court's Power of Supervision . 18

(a) The decisions of this Honorable Court and of the Circuit Court of Appeals for the Second, Third and Sixth Circuits, substantiate the proposition advanced by the petitioners that assumption of risk is not available as a defense to actions under the Jones Act under any circumstances 18

(b) The Circuit Court of Appeals in its decision, apparently adopted a particular feature of the concurring opinion of Mr. Justice Frankfurter in the case of Tiller v. Atlantic Coast Line R. Co., 318 U. S. 54, regarding assumption of risk, which was contrary to that expressed in the majority opinion of this Honorable Court. . 20

CONCLUSION 23

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OCTOBER TERM, 1943.

No.

MARY C. ROBERTS, ADMINISTRATRIX, ET AL.,
PLAINTIFFS, APPELLANTS, PETITIONERS,
v.
UNITED FISHERIES VESSELS COMPANY,
DEFENDANT, APPELLEE, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice of the Supreme Court of the United States and the Associate Justices thereof:

The petitioners, Mary C. Roberts, Administratrix of the Estate of Velmer Joseph Roberts and Irene F. Bennett, Administratrix of the Estate of Samuel Cotreau, respectfully pray that a Writ of Certiorari may issue to review the judgment of the United States Circuit Court of Appeals for the First Circuit in the case of *Mary C. Roberts, Administratrix, et al.* v. *United Fisheries Vessels Company,* — Fed. (2d) — (Rec. p. 50), rendered on March 20, 1944, which affirmed the judgment of the District Court, entered on May 15, 1943 (Rec. pp. 9, 11).

JURISDICTION.

The jurisdiction of this Court is invoked under the Act of February 13, 1925, c. 229, Sec. 1; 43 Stat. 938; U.S. Code, Title 28, Sec. 347.

This petition was filed within three months from March 20, 1944, the date of entry of the judgment of the Circuit Court of Appeals, as required by Section 8 of the Act of Feb. 13, 1925, *supra* (U.S. Code, Title 28, Sec. 350).

Notice of the filing of this petition, together with a copy of the petition, printed record and supporting brief, has been duly served by the petitioners upon counsel for the respondent and due proof of such service filed with the Clerk, as required by Rule 38 of this Court.

THE QUESTIONS PRESENTED.

There are two fundamental questions here presented:

First: The standard of care required of a master for the protection of members of his crew, in an action under the Jones Act, and, in connection therewith, a further amplification of the definition of "negligence" in seamen's suits under the said act.

Second: Whether assumption of risk is still available as a defense to a seaman's action under the Jones Act, and, in connection therewith, a further amplification of this Court's decision in the case of *Tiller* v. *Atlantic Coast R. Line Co.,* 318 U.S. 54, and the application of the same to actions under the Jones Act.

STATUTES INVOLVED.

These actions are based upon the provisions of Title 46, United States Code, Section 688, commonly known as the Jones Act, which provides:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such actions all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any

seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

The said statute by reference to the remedy of railway employees, incorporates and adopts as part of its own provisions, Title 45, United States Code, Sections 50-60, inclusive, commonly known as the Federal Employees Liability Act, the applicable provisions of which are as follows:

Section 51. "Every common carrier by railroad . . . shall be liable in damages to any person suffering injury . . . or, in case of the death of such employee, to his or her personal representative, . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, . . ."

Section 53. "In all actions . . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee . . ."

Section 54. "That in any action brought . . . to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents or employees of such carrier; . . ."

STATEMENT OF THE CASE.

These are civil actions, in tort, brought by the respective plaintiffs as the duly appointed administrators of the estates of Velmer Joseph Roberts and Samuel Cotreau. Roberts and Cotreau were fishermen employed on the fishing schooner J. M. MARSHALL and while engaged in the course of their employment on November 28, 1941, met their death by drowning when lost at sea during a storm on said day. The J. M. MARSHALL was a two-mast fishing schooner, known in the industry as a dory fishing vessel and carried a full complement of 21 men, including captain, engineer, cook and eighteen dory fishermen. It generally sailed to the fishing grounds in the North Atlantic Ocean and was fishing Southwest of Seal Island, Nova Scotia, in about three hundred feet of water, when Cotreau and Roberts were lost. Fishing operations were carried on by sending out nine dories from the J. M. MARSHALL, with two men in each dory, and with each of said dories laying out an individual trawl-line on the bottom of the ocean, about a mile and a half in length, with fish being caught by the thousands of hooks attached to said trawl-lines. (Hynes, Rec. p. 20; Moulaison, Rec. pp. 22, 23.)

Cotreau and Roberts were dory-mates, and were in the same dory when a storm suddenly arose. A northwest wind came up with the suddenness of a squall and began blowing about thirty to forty miles per hour; the sea became rough and the tide swung around so that it was running against the wind, causing "rip-tides"; the sea and waves were running continuously at a height of between fifteen to twenty feet and were breaking as high as twenty to thirty feet up in the rigging of the Schooner J. M. MARSHALL. The captain had ordered the men to set two and a half tubs of trawl per dory, and in accordance with the understanding of the dory fishing industry, the fishermen were under or-

ders to remain out in their dories until they finished their job of "making a set" before returning to the vessel; that if they cut their trawl-lines and returned to the vessel before completing their job of "making a set," they would be acting in disobedience of orders, unless a flag was hoisted in the rigging of the vessel, the master's signal to cut trawl-lines because of impending danger and return to the vessel immediately. No flag was hoisted in the rigging that day and the men remained out during the storm, which was increasing in intensity and were last seen in their dory about forty-five minutes after the storm began. The dories were constructed of wood, about eighteen feet in length, and when last seen, the top of the sides of the mid-section of the dory involved, was about nine inches above the level of the water. (Hynes, Rec. p. 21; Moulaison, Rec. pp. 22, 23, 24; Crowell, Rec. pp. 26, 27.)

The plaintiffs filed requests for instructions to the jury and duly saved their exceptions to the court's refusal to instruct the jury on the matters raised by certain requests therein filed. (Rec. pp. 18, 19, 38.)

The jury found for the defendant in each of the said actions in the trial before the District Court and the appeal to the Circuit Court of Appeals for the First Circuit, was based upon the refusal of the trial court to give the instructions requested by the plaintiffs. (Rec. pp. 9, 11, 36).

STATEMENT OF POINTS RELIED UPON IN APPEAL TO CIRCUIT COURT.

The points which the plaintiffs relied upon in their appeal to the Circuit Court, were based upon the trial court's refusal and failure to instruct the jury as follows:

(1) In applying the test of acts and conduct of the master of a vessel, to determine whether the master was negligent, the standard of care to be exercised in

a case under the Jones Act is a higher degree of care than that required of shore employers and under the common law. (Request No. 10, Rec. p. 18.)

(2) If the jury find that the master of the defendant's vessel, while the crew was engaged in fishing from dories on the high seas and including the plaintiffs' intestates, speculated on the length and severity of the stormy conditions of sea and wind, which were then in existence or could have been reasonbly foreseen, and failed to order his men to return to a place of safety on the vessel, this would be evidence of negligence. (Request No. 8, Rec. p. 18.)

(3) If the jury find that there were obvious dangers which the plaintiffs' intestates could have observed and appreciated, yet continued with their work, they cannot be charged with having assumed the risk of such dangers while carrying out the orders of the master of their vessel. (Request No. 11, Rec. p. 19.)

REASONS SUBMITTED FOR THE ALLOWANCE OF THIS PETITION.

First: The course of reasoning and decision rendered by the Circuit Court of Appeals, as it relates to the standard of care in seamen's actions under the Jones Act, was in conflict with decisions of this Honorable Court and with decisions of the Circuit Court of Appeals for the Second, Third and Fourth Circuits and was such a departure from the accepted and usual course of judicial proceedings in actions under the Jones Act, as to call for the exercise of this Court's power of supervision.

Second: The course of reasoning and decision rendered by the Circuit Court of Appeals, as it relates to assumption of risk in seamen's actions under the Jones Act, was in conflict with numerous decisions of this Honorable Court and with decisions of the Circuit Court of Appeals for the Second, Third, and Sixth Circuits and was such a departure

from the accepted and usual course of judicial proceedings in actions under the Jones Act, as to call for the exercise of this Court's power of supervision.

PRAYER FOR WRIT.

Wherefore, your petitioners, by their undersigned counsel, respectfully pray that a Writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the First Circuit, commanding that Court to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case entitled *Mary C. Roberts, Administratrix, et al., Plaintiffs, Appellants* v. *United Fisheries Vessels Company, Defendant, Appellee,* being designated and numbered on its docket October Term 1943, No. 3947, and that the said judgment of the Circuit Court of Appeals may be reviewed by this Honorable Court, to the end that your petitioners may have the relief therein prayed for and such other and further relief in the premises as to this Honorable Court may seem just and proper.

Respectfully submitted,

MARY C. ROBERTS, *Administratrix,*
AND
IRENE F. BENNETT, *Administratrix,*
by their Attorney,
H. S. AVERY,
177 State St., Boston, Mass.

Counsel:

A. L. KAPLAN,
177 State St., Boston, Mass.

CERTIFICATE.

I hereby certify that I am counsel for the petitioners herein, Mary C. Roberts, Administratrix and Irene F. Bennett, Administratrix; that in accordance with the request of said petitioners the within petition has been presented; that the allegations contained in said petition are true, to the best of my knowledge and belief; and that said petition is, in my opinion, well founded in law and in fact and should be granted.

H. S. AVERY.

COMMONWEALTH OF MASSACHUSETTS.

COUNTY OF SUFFOLK, ss., Boston, June 10, 1944.

Then personally appeared H. S. Avery of Boston, Massachusetts, and made oath that he caused the foregoing petition to be prepared and signed the same and that same is prepared with the consent of and in accordance with the request of the petitioners named therein and that the allegations contained in said petition are true to the best of his knowledge and belief.

Before me,

ABRAHAM L. KAPLAN,
Notary Public.

[SEAL]

My commission expires March 31, 1950.